Supreme Court, U.S.
FILED
MAR 16 1993
OFFICE OF THE CLERK

92-No. 1379

In The Supreme Court Of The United States

OCTOBER TERM, 1992

MICHIGAN ROAD BUILDERS ASSOCIATION, INC., et al.,

Petitioners,

v.

THE DIRECTOR OF THE MICHIGAN DEPARTMENT OF TRANSPORTATION, in his official capacity, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC. AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTIONS PRESENTED FOR REVIEW

Whether a state must first ascertain the nature and scope of past discrimination against members of racial minority groups before adopting a race-based preference program which sets aside funds for members of such minority groups in excess of the "not less than 10%" directed by the Surface Transportation and Uniform Relocation Assistance Act of 1987.

Whether one seeking to challenge a governmental policy allocating specified highway contracts or parts thereof to businesses owned by members of racial minority groups can establish standing under Article III by showing that the policy excludes bids of non-minorities from consideration.

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BRIEF FOR THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC. AS AMICUS CURIAE SUPPORTING PETITIONERS

The Associated General Contractors of America, Inc., with the written consent of the parties, submits this brief as Amicus Curiae in support of the petitioners. The letters of consent have been filed separately herewith.

INTEREST OF THE AMICUS CURIAE

The Associated General Contractors of America, Inc. ("AGC") is a private, non-profit trade association founded in 1918 to represent the national interests of general construction contractors. Approximately 8,000 of the leading firms engaged in general contracting are among the association's approximately 33,000 members. Among other things, these firms construct highways, bridges, buildings, industrial facilities, and municipal utilities.

AGC has 100 state and local chapters throughout the United States, with at least one chapter serving each state, and one chapter in Puerto Rico. The Michigan Road Builders Association is one of three AGC Chapters int he State of Michigan, and like many other AGC members, its members perform a substantial amount of public works.

AGC and its chapters therefore have a great interest in government contracting policies and procedures. When necessary, AGC and its chapters turn to the courts for assistance with related issues. Several AGC chapters have brought cases similar to this one. AGC has most recently participated in this Court's proceedings as amicus curiae in *Building and Construction Trades Council of the Metropolitan District v. Associated Builders and Contractors of Massachusetts/Rhode Island*, Nos. 91-261 and 91-274, and as *amicus curiae* in a case brought by another AGC Chapter, *Northeastern Florida Chapter of the Associated General Contractors of American v. City of Jacksonville, Florida*, No. 91-1721.

AGC's longstanding policy is to support open competitive bidding for public construction contracts. The purposes of competitive bidding and AGC's related policy are "to give all persons equal rights to compete for Government contracts; to prevent unjust favoritism, collusion or fraud in the letting of contracts for the purchase of supplies; and thus to secure for the Government the benefits which arise from competition." *United States v. Brookridge Farm*, 111 F.2d 461, 463 (10th Cir. 1940).

AGC is concerned that the Sixth Circuit's opinion will encourage states and localities to resort to race-based preferences whenever and merely because minority firms are available to do the work. This case impinges on one of the deepest concerns of an industry committed to equal opportunity but heavily burdened by government requirements politically for attractive results.

STATEMENT OF THE CASE

The *amicus* adopts Petitioners' Statement of the Case, but emphasizes the following.

This action was commenced on May 8, 1990 by the Michigan Road Builders Association, Inc. (hereinafter "MRBA" or Petitioners) seeking declaratory relief and an injunction against the continued enforcement of policies adopted by the Michigan State Transportation Commission (hereinafter the "Commission"). These policies exclude 95% of MRBA's 120 members, who perform 75% of the total dollar value of all state highway construction contracts, from bidding on selected highway construction contracts let by the Michigan Department of Transportation

(hereinafter "MDOT") because of the members' race, ethnic origin, and gender.

Specifically, the Commission adopted a policy requiring fifteen percent (15%) of the dollar amount of all federal-aid highway funds awarded or administered by MDOT to be expended with disadvantaged business enterprises (DBE's), minority business enterprises (MBE's), women business enterprises (WBE's), and handicapped-owned businesses (HBO's).

The Commission also mandated the use of "prime contract set-asides" which expressly limited consideration of bids or proposals to those submitted by DBE/MBE/WBE/HBO firms. The policy sets forth the reasons for adoption of these set-asides:

> Recognizing the department's commitment to DBEs/MBEs/WBEs/HBOs and recognizing that inequities have limited DBEs/MBEs/WBEs/HBOs in their ability to obtain adequate working capital, bonding and prerequisite experience necessary to be competitive, a set-aside technique will be used by the department. The set-aside technique, included in the regular lettings, will be used to meet the overall goals and to provide construction services and procurement opportunities for DBEs/MBEs/WBEs/HBOs. Participation in set-aside contracts will provide firms the opportunity to gain experience in the transportation industry.

The policy authorizes no waiver provisions. Neither the goal nor the identification of which contracts are to be set-aside can be questioned.

The Commission adopted this policy, including the 15% goal, on February 24, 1988, the day after the Sixth Circuit Court of Appeals denied the State's Motion for Rehearing and Rehearing En Banc in *Michigan Road Builders Association v. Milliken*, 834 F.2d 583 (6th Cir. 1987), *aff'd*, 109 S.Ct. 1333, 103 L.Ed.2d 804 (1989), where the court had held that a Michigan statute setting aside 7% of the State's discretionary expenditures for MBE's, and 5% for WBE's, was unconstitutional because the State had no evidence of prior discrimination in its highway construction industry.

The regulation at issue has been long-lived. It appears in the Surface Transportation and Uniform Relocation Assistance Act of 1987 (STURAA), which was a successor to the Surface Transportation Assistance Act (STAA), enacted in 1983. Although under STURAA the regulation expired in 1992, it was readopted and remains in effect under the Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA). The principal difference is that STURAA and ISTEA include women-owned businesses on DBE's.

The court first held that neither MRBA nor any of the individual contractors had standing to maintain the action.

Notwithstanding its holding that Petitioners lacked standing, the district court went on to determine the case on the merits. The court held that Congress intended the

STURAA, to authorize the commission to require "the maximum level of DBE participation possible" and to use the set aside to assure attainment of that goal.

On appeal, in an unpublished opinion the Sixth Circuit Court of Appeals affirmed the district court's judgment against Petitioners, adopting the district court's decision of the case on the merits as the basis for its decision to affirm the judgment. App. at 1-2. The Sixth Circuit stated that:

> While the panel differs with some of the conclusions of the district court concerning lack of standing, we nevertheless agree with the court's reasoning concerning the merits of the claims brought by plaintiffs, and therefore adopt that reasoning as set out by the court in its opinion of April 11, 1991. Under the circumstances of this case, resolution of the appeal is governed by the Supreme Court's opinion in *Fullilove v. Klutznick*, 448 U.S. 448 (1980), rather than by the opinion released in *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469 (1989).

SUMMARY OF ARGUMENT

The Sixth Circuit failed to apply this Court's rulings defining the parameters of Congress' authority to authorize states to enact race preferences as a remedy for discrimination. Specifically, the Sixth Circuit disregarded this Court's basic premise that racial preferences may influence the award of public contracts, if at all, then only for demonstrably remedial purposes. In the absence of any

Congressional mandate to remedy discrimination under § 5 of the Fourteenth Amendment, the state cannot adopt a preferential program without a record that satisfies the Croson requirements.

If this Court determines to review the issues regarding standing, then it is submitted that the test to be imposed on petitioners is whether their pleadings and evidence establish a realistic danger of sustaining a direct injury as a result of the challenged program's operation or enforcement.

REASONS FOR ALLOWANCE OF THE WRIT

THIS COURT SHOULD GRANT THE WRIT BECAUSE THE DECISION OF THE COURT OF APPEALS HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN SETTLED BY THIS COURT, AND OTHER CIRCUITS HAVE REACHED CONFLICTING DECISIONS.

ARGUMENT I

A state must first ascertain the nature and scope of past discrimination against members of racial minority groups before adopting a race-based preference program which sets aside funds for members of such minority groups in excess of the "not less than 10%" directed by the Surface Transportation

and Uniform Relocation Assistance Act of 1987.

Petitioners' position is that a state in adopting goals and set-asides in excess of the 10% figure approved in STURAA and ISTEA must satisfy the requirements of *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469 (1989) that the record demonstrate that the state actor has a firm basis for concluding that additional measures are needed to remedy identified discrimination and that its actions are narrowly tailored to the remedial objective.

The Sixth Circuit concluded that since the program involved was a federal program governed by *Fullilove v. Klutznick*, 448 U.S. 448 (1980) and since the state complied with the applicable federal regulations in increasing the goals, the increased goals were acceptable without further need to demonstrate a remedial purpose. The District Court interpreted *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990) as applying the *Fullilove* rationale to any program approved by Congress. 761 F. Supp. at 1314. The Court in effect construed the statute to permit racial preferences limited only by the capacity of minority business to do the work.

However, under *Fullilove* whether a preference enacted by congress will pass muster is still dependent on whether the preference is remedial and narrowly tailored. 448 U.S. at 480 (Burger, C.J.) While in *Fullilove* the Court upheld the facial validity of a 10% goal, the case involved no suggestion of any circumstances in which a state could adopt a goal in excess of that amount.

The Sixth Circuit's rote application of *Fullilove* and *Metro Broadcasting* fails on two points: (1) it misconstrued *Fullilove* to establish the standard of review of wholly autonomous state action and (2) the statutory language does not support the court's construction that the "not less than" 10% language allows "a state recipient of federal funds to set a goal of more than 10%. *See* 49 C.F.R. § 23.64(d)." 761 F.Supp. 1303, 1314-15.

1. Review of State Action

The issue concerned here is the level of scrutiny to be applied to state action that relates to a federal program but goes beyond anything that congress has sought to authorize.

The inquiry required by strict scrutiny is set out in *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469 (1989). In *Metro Broadcasting,* Justice O'Conner cited *Croson* for the proposition that strict scrutiny also applies to federal programs. [T]he Constitution requires that the court apply a strict standard of scrutiny to evaluate racial classifications..." *Metro Broadcasting*, 497 U.S. at 603 (O'Conner, J. dissenting).

Nevertheless, the central question is whether Congress provided a sufficiently precise mandate for this court to conclude that the racial preference embodied in the MDOT program was the product of congressional, rather than state, judgment. Given the suspect nature of racial classifications, federal legislation cannot be said to direct their use unless Congress itself makes the "critical determinations" necessary to define the race-based program. *Fullilove v. Klutznick*, 448 U.S. 448, 468 (1980) (Burger,

C.J.) . See *O'Donnell Construction Company v. District of Columbia*, 963 F.2d 420, 423, (D.C. Cir., 1992) (Congressional oversight of the District of Columbia did not transform the D.C. Council's action unto congressional legislation designed to enforce the Fourteenth Amendment.)

Initially, *Fullilove* makes it clear that congressional involvement in a racially preferential program does not foreclose judicial review:

> Here we pass not on a choice made by a single judge or a school board, but on a considered decision of the Congress and the President. However, in no sense does that render it immune from judicial scrutiny, and it "is not to say that we 'defer' to the judgment of congress. . . on a constitutional question. . ."

448 U.S. at 473 (Burger, C.J.) Nothing in *Metro Broadcasting* is to the contrary, and that case is distinguishable on its facts. Strict scrutiny of the challenged state action need not implicate this court's ruling in *Metro Broadcasting,* which involved the standard of review for a federal policy which congress had unambiguously endorsed and approved. In this case, the need for a state to increase its goals or mandate set-asides for remedial purposes was never identified by the Congress, MDOT, or any federal official.

In *Metro Broadcasting* the majority based its holding on the fact that the program at issue was specifically approved by congress:

> "It is of overriding significance in these cases that FCC's minority ownership programs have been specifically approved--indeed mandated--by Congress.

497 U.S. at 563. The majority expressly based its decision on the fact the specific programs at issue had been "mandated" by the Congress.

> "We hold that benign race-conscious measures mandated by congress--even if those measures are not "remedial" in the sense of being designated to compensate victims of past governmental or societal discrimination--are constitutionally permissible to the extent that they serve important governmental objectives..."

497 U.S. at 564-65.

In cases where Congress has not made the critical determinations, or the State has exceeded the federal parameters, a number of other circuits have held that the action by a state to increase the goals had to independently justify race-based action. *H. K. Porter Co. v. Metropolitan Dade County*, 975 F. 2d 762 (11th Cir. 1992); *Milwaukee Pavers' Association v. Fiedler*, 922 F. 2d 419 (7th Cir. 1991), *cert. denied* ___ U.S. ___ , 114 L. Ed.2d 714 (1991).

In *H. K. Porter Company, Inc. v. Metropolitan Dade County*, 489 U.S. 1062 (1989) this Court vacated a judgment of the Eleventh Circuit Court of Appeals that had rejected a challenge to local action under a federal MBE

program. The Supreme Court remanded the case "for further consideration in light of *City of Richmond v. J.A. Croson Company*". *H.K. Porter* teaches that, even though Congressionally authorized spending is involved, judicial review as to constitutional compliance is necessary and not limited to issues of federal authority purportedly delegated to state and local recipients.

On remand the Court of appeals distinguised *Metro Broadcasting* on grounds that it involved programs that were "specifically approved - indeed, mandated - by Congress", and found no federal mandate for the State action. *H. K. Porter,* 975 F.2d 762, 765 (11th Cir. 1992) (petition for rehearing pending).

The question, of course, is how precise the federal mandate must be before it can cloak racial discrimination with federal approval. Federal appellate cases establish two specific requirements.

First, Congress itself must define the scope of the preferential program. If Congress fails to define the extent of the program, the implementing agency must exercise its discretion and fill the gap. In such a case, the program reflects the judgment of the agency rather than Congress, and the agency must independently establish the constitutionality of the program.

This principle has been enunciated most clearly in the context of federal aid to state highway construction programs. STURAA requires that 10% of federal highway aid be expended with firms owned and controlled by minorities or women. Pub. L. 100-17, §106(c), 101 Stat. 132, 145 (1987). If a state seeks to attach similar require-

ments to state expenditures for highway construction beyond the 10% set-aside required by Congress, it cannot to that extent claim a congressional mandate. The state's program must stand or fall on its own merits. *Milwaukee Pavers' Ass'n v. Fiedler*, 922 F. 2d 419, 424-425 (7th Cir. 1991), *cert. denied*, 111 S.Ct. 2261 (1991). Indeed, in *Cone Corp. v. Hillsborough County*, 908 F. 2d 908 (11th Cir. 1990), *cert. denied*, 114 L.Ed.2d 479 (1991), the fact that the county had to independently justify its race-based contracting program after it expanded the program beyond the scope of the congressional mandate was not even questioned. *See also, H.K. Porter Co., supra,* at 765-766 (holding that Congress had not mandated a minority set-aside program where the relevant legislation did not "dictate a specific percentage set-aside" for minorities). *Fullilove, supra*, at 468 (enumerating "the specification of a minimum level for minority business participation" as a "critical factor" determined by Congress).

2. *Statutory Construction*

The initial error by the lower courts is the finding that STURAA had authorized adoption of a DBE goal greater than 10%. There is nothing on the face of the statute to compel that conclusion, and no legislative history indicates the existence of any such authorization. A contrary construction of the statute is not only in accord with the intent of congress but also avoids the need for searching constitutional inquiry into the relationship between sections 5 and 1 of the Fourteenth Amendment and, in turn, the power of congress to authorize limitless racial preferences. *NLRB v The Catholic Bishop of Chica-*

go, 440 U.S. 490 (1979); *Public Citizen v. United States*, 491 U.S. 440 (1989); *DeBartolo Corp. v. Florida Gulf Trades Comm'n*, 485 U.S. 568 (1988).

One of the changes made by STURAA to the 1982 authorizing act was the addition of Women Business Enterprises as DBEs. Notwithstanding the addition of this group, the Secretary of Transportation was directed not to:

> . . . increase the overall 10 percent DBE requirement set by this section as a result of the inclusion of WBEs as a presumptive group.

House Conference Report No. 100-27, 100th Cong. First Session, Mar. 18, 1987, p. 148; 1987 U.S. Code Cong. & Admin. News, 133.

Congress was clearly not mandating that MDOT should adopt as a goal the "maximum level of DBE participation possible." In fact, since Congress was the body which determined what discrimination existed in the highway construction industry and what level of remediation was required to remove the effects of the past discrimination, it is clear that a goal in excess of 10% was viewed as not necessary to the achievement of that objective. Id.

Congress not only did not mandate a requirement that states adopt goals in excess of 10%, but it mandated that the goal remain at 10% notwithstanding the significant expansion of the preferred class. Any contention that STURAA mandates goals in excess of 10% is clearly erroneous.

In addition, during debate over the current federal highway aid authorization bill (ISTEA) an amendment was offered in the House of Representatives to increase STURAA's set-aside by providing 10% for DBEs, which would no longer include women-owned businesses, and a separate 5% for WBEs, for an overall goal of 15%. The amendment was defeated. "Congressional Record," October 23, 1991 at 1710.

The Court placed great emphasis on the "not less than" language of STURAA. However, if Congress had fixed the maximum goal in stone at 10%, then a state which had made independent findings of discrimination in its contracting procedures would be prohibited from adopting any remedial policy involving federally funded projects which exceeded 10%, regardless of its compelling interest. That is why Congress used the "not less than 10%" language. Ten percent would remedy Congress' findings, and states would not be prohibited from utilizing federal funds to remedy other discrimination. A state that wishes to set a higher goal for a compelling governmental interest is permitted, but not required, to do so.

The only construction of STURAA is that Congress made findings of past discrimination in the highway construction industry and concluded that, if 10% of the funds appropriated for highway construction were expended with DBEs, the present effects of such past discrimination would be eliminated. If Congress had intended to authorize states to adopt goals higher than 10%, it could have easily done so in clear and concise language.

The rule adopted by the Sixth Circuit would just as easily permit MDOT to adopt any DBE goal between 10%

and 100% so long as there was an available pool of "certified" DBEs to do the type of work required by MDOT. (A similar result was reached recently in *Harrison & Burrowes Bridge Construction, Incorporated v. Cuomo*, 981 F.2d 50 (2d cir., 1992) Such a rule is no rule at all in operation because it permits constantly increasing DBE goals with no concern for their impact on the non-preferred groups. That does violence to the Supreme Court's command that the rights guaranteed by Section 1 of the Fourteenth Amendment are "guaranteed to the individual" and "are personal rights", *Shelley v. Kraemer*, 334 U.S. 1, 22 (1948).

This Court should rule that STURAA does not empower states to increase the goals or adopt set-asides without a proper showing that it is enacting a narrowly tailored remedy for identified discrimination.

ARGUMENT II

> Whether one seeking to challenge a governmental policy allocating specified highway contracts or parts thereof to businesses owned by members of racial minority groups can establish standing under Article III by showing that the policy excludes non-minority bids from consideration?

The Court of Appeals apparently agreed that Petitioners' had standing. It noted that it "differs with some of the conclusions of the district court concerning lack of standing," App. at 1, and went on to the merits. No cross-petition on standing has been noted. The court would lack

jurisdiction to consider the merits if standing were lacking. *See Christianson v. Colt Industries Operating Corp.*, 486 U.S. 800, 818 (1988), 870 F.2d 1292 (7th Cir. 1989), *cert. denied*, 493 U.S. 822 (1989); *Firestone Tire and Rubber Co. v. Risjord*, 449 U.S. 368, 379 (1981).

However, since this Court is not required to accept the lower court's rulings on standing, and Petitioners have requested review of the issue, the following is offered in support of the Petitioners.

Unlike the situation in *Northeastern Florida Chapter Associated General Contractors of America v. City of Jacksonville* (No. 91-1721) in which the issue was whether standing was properly pled, in this case there was testimony at trial. Both cases adopted a mechanical test requiring a plaintiff to seek to bid on a contract before challenging the exclusion from biddings.

The findings of fact, noted that Petitioners perform 75% of the value of state contracts, and that the association's executive director testified that Petitioners members desired to bid on set-aside contracts but were excluded. A non-minority witness who fabricated traffic control signs testified that had he been permitted, he would have bid on two projects that were set aside. 761 F.2d at 1306

The district court cited the *Cone Corp. v. Florida Department of Transportation*, 921 F.2d 1190 (11th Cir. 1980), the precursor of the *City of Jacksonville* case, as adopting a mechanical rule that *Warth v. Seldin*, 422 U.S. 490 (1975) and other cases required that the contractor

actually apply for certification as a DBE. Testimony showed that no white firm has been certified as a DBE. *Id.* at 1308. In addition the court held the witness should have been on the contract from which he was excluded. *Id.* at 1310. Petitioner correctly notes that it would be futile for the witness to have attempted to apply for certification on a DBE because he was white and not disadvantaged.

In numerous cases in which the plaintiff was completely precluded from consideration for benefits for which it would otherwise be eligible, the courts have found Article III standing to be present regardless of whether the plaintiff actually went through the futile gesture of applying for benefits from which it was precluded. *See, Regents of the University of California v. Bakke*, 438 U.S. 265, 280-281, N. 14 (constitutional injury in fact requirement satisfied merely by denial of opportunity to compete for place in class based on race); *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977) (exclusion from opportunity to obtain housing sufficient to confer standing despite failure to apply for housing); *CC Distributors, Inc. v. United States*, 833 F.2d 146, 149-150 (D.C. Cir. 1989) (denial of opportunity to compete is sufficient injury to confer standing); *DKT Memorial Fund Ltd. v. Agency for Int'l Development*, 691 F.Supp. 394, 397-98 (D.D.C. 1988), *aff'd in part, rev'd in part on other grounds*, 887 F.2d 275 (D.C. Cir. 1989) (standing upheld based on exclusion from funding despite no application for funding); *W. Va. Ass'n of Com. Health Centers v. Heckler*, 734 F.2d 1570, 1574-75 (4th Cir. 1984) (standing found based simply on denial of opportunity to compete for funding); *Planned Parenthood Ass'n of Chicago v. Keminers*, 700 F.2d 1115, 1118-20 (7th Cir.

1983) (standing satisfied where statute prevented plaintiff from competing freely for funds).

Moreover, the Sixth Circuit's decision is in conflict with other courts of appeal that have considered standing in cases involving set asides. In *Coral Construction v. King County*, 941 F.2d 910, 929-30 (9th Cir. 1991), the Defendants' policy entitled WBE's to an automatic five percent (5%) competitive advantage over non-WBE contracting terms. The Court found that plaintiffs had standing to challenge the program because it contained an "objectively unequal bidding process." *Id.* at 22. In other words, the court found a concrete injury in fact to exist simply because "majority contractors did not enjoy an equal playing field for contracts awarded under the set-aside method." *Id.* at 21. Depriving the plaintiff of an equal opportunity to bid was held sufficient to confer standing in *O'Donnell Construction Company v. District of Columbia* 963 F.2d 420, 423 (D.C. Cir. 1992.)

In the present case, as in *Coral Construction*, MDOT's policy contains an objectively unequal bidding process. Plaintiffs do not enjoy an equal playing field because the Defendants set aside a portion of their contracts for DBE/MBE and WBE bidders only; non-DBE/MBE and WBE firms are precluded from having their bids considered at all. Thus, as in *Coral Construction, Bakke,* and the numerous other cases cited above, the Plaintiffs herein have suffered a concrete injury in fact based on their exclusion from the bidding process. As in the other cases, a futile application is not necessary. *See, Int'l Brotherhood of Teamsters v. United States,* 431 U.S. 324 (1977).

Standing for the purpose of a facial challenge to a law can be established by showing that the ordinance will be enforced against the plaintiff and there is a realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement. *Pennell v. City of San Jose*, 485 U.S. 1, 8 (1988).

Writing for the Court, the Chief Justice noted that "application of the constitutional standing requirement [is not] a mechanical exercise." *Id.* at 7, citing *Allen v. Wright*, 468 U.S. 737, 751 (1984). The Chief Justice concluded that the likelihood that the ordinance would be enforced to the disadvantage of the Association's members "is a sufficient threat of actual injury to satisfy Article III's requirement that '[a] plaintiff who challenges a statute must demonstrate a realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement." *Id.* at 708, citing *Babbitt v. Farm Workers*, 442 U.S. 289, 298 (1979).

Here, the MRBA testified that it is excluded from competing for contracts on the basis of race. That is an injury in fact. Moreover, the sheer volume of business done by Petitioners' members makes it clear that there was a "realistic danger" of sustaining a direct injury as a result of the statute's operation or enforcement.

In *Babbitt, supra*, 442 U.S. 299, it was held that where the challenged election procedures would burden freedom of Association it was not necessary to first seek to invoke the procedures in order to have standing. The argument in *Babbitt* was much like that of the Sixth Circuit to establish standing to sue for the relief requested: delaying adjudication until plaintiffs invoke the election

procedures might mean a better factual record. 442 U.S. at 300. However the testimony was adequate.

> We are persuaded however that awaiting appellees' participation in an election would not assist our resolution of the threshold operation whether the election procedures are subject to scrutiny under the First Amendment at all.

Id., 442 U.S. at 301.

the certainty of enforcement and "the total likelihood that it would result in the exclusion of some Petitioners from bidding is sufficient to confer standing.

CONCLUSION

For the foregoing reasons the Petition for Writ of Certiorari should be granted.

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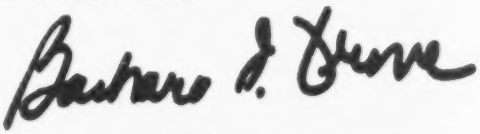
MAILING CERTIFICATE

I hereby certify that on this 18th day of March 1993, I filed via certified mail 40 copies of the Brief Amicus Curiae with the Clerk's Office of the Supreme Court of the United States.

The necessary filing and mailing was performed in accordance with the instructions given me by counsel in this case.



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OPPOSITION

BRIEF

No. 92-1379

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1992

Supreme Court, U.S.
FILED
MAR 19 1993
OFFICE OF THE CLERK

MICHIGAN ROAD BUILDERS ASSOCIATION, INC., et al,

Petitioners,

v.

THE DIRECTOR OF THE MICHIGAN DEPARTMENT OF TRANSPORTATION, in his official capacity, et al,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

I

WHETHER RESPONDENT'S FISCAL YEAR 1991 DBE GOAL OF 15%, WITH THE LIMITED USE OF SET-ASIDE CONTRACTS IN THE AMOUNT OF 1.32%, WAS ENTIRELY CONSISTENT WITH AND INDEED MANDATED BY THE SURFACE TRANSPORTATION AND UNIFORM RELOCATION ASSISTANCE ACT OF 1987 AND ITS IMPLEMENTING REGULATIONS.

II

WHETHER THE LACK OF STANDING ISSUE IS IRRELEVANT AND MOOT WHEN BOTH COURTS BELOW ADDRESSED THE MERITS AND THE SIXTH CIRCUIT DID NOT AFFIRM THE RULING THAT PETITIONER LACKED STANDING.

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STATEMENT OF THE CASE

As a condition of receiving federal funds for highway construction projects, recipients such as the Michigan Department of Transportation ("MDOT") must comply with the provisions of the Surface Transportation and Uniform Relocation Assistance Act of 1987, Pub. L. 100-17, 101 Stat 132 (1987) ("STURAA") and its implementing federal regulations, 49 CFR § 23.1 et seq, including those relating to the use of Disadvantaged Business Enterprises ("DBEs"). (Pet. App. 36a-56a) Under the federal regulations, recipients are required to annually set goals for participation of DBEs in federally funded highway projects and submit the goals to the designated agency of the United States Department of Transportation ("USDOT") for review and approval.

Petitioner Michigan Road Builders Association, Inc. ("MRBA") initially challenged MDOT's DBE goal approved for use in Fiscal Year (FY) 1990, but during the course of this litigation, the 1990 DBE goal was superseded by MDOT's DBE goal approved for use in FY 1991. Trial was conducted based upon the 1991 DBE goal.[1]

1. The federal scheme under STURAA.

At issue in this case are federal highway dollars distributed to Michigan under STURAA.

---

[1]Since trial of this case, Congress has re-authorized STURAA under the Intermodal Surface Transportation Act of 1991, Pub. L. 102-240, 105 Stat 1918-1919. The pertinent language is identical to that which appeared in STURAA. It should also be noted that MDOT continues to recommend for approval a new DBE goal for each fiscal year; MDOT has obtained approval of a DBE goal for FY 1993 of 13.52%. This case, however, involves STURAA and MDOT's FY 1991 federally approved DBE goal.

STURAA states, in part, as follows:

> Except to the extent that the Secretary determines otherwise, not less than 10 percent of the amounts authorized [for highway projects] . . . shall be expended with small business concerns owned and controlled by socially and economically disadvantaged individuals [DBEs]. Section 106(c) of STURAA. [Emphasis added.]

Federal regulations to implement the 10% minimum national DBE goal are set forth at 49 CFR, Part 23.[2]

---

[2] 49 CFR § 23.1(b) states in part as follows:

> This part implements . . . Title 23 of the U.S. Code (relating to highways and highway safety).

STURAA is part of Title 23. 49 CFR § 23.2 states, in part:

> This part applies to any DOT program through which funds are made available to members of the public for accomplishing DOT's purposes.

In order for a contracting business to be certified as a DBE, the business must meet certain criteria as set forth in 49 CFR § 23.53. A contracting firm is disadvantaged, according to the federal regulations, if it is small[3] and is owned and controlled by individuals who are socially and economically disadvantaged.

Under the federal regulations, there is a rebuttable presumption that women, Black Americans, Hispanic Americans, Native Americans, Asian-Pacific Americans, or Asian-Indian Americans are socially and economically disadvantaged.

---

[3]What constitutes "small" is defined in STURAA and its implementing regulations by reference to section 3 of the Small Business Act, 15 USC § 632 and the relevant regulations promulgated thereunder.

Other individuals may be found to be socially and economically disadvantaged on a case-by-case basis. If an individual applies for DBE certification, the state must make a determination of social and economic disadvantage, whatever the individual's race, ethnic origin and gender may be. This process allows for the certification of socially and economically disadvantaged white males as well as the denial of certification for members of presumptive groups who are found not to be socially and economically disadvantaged. A white male was, in fact, found to be socially and economically disadvantaged as a result of his handicap and certified by MDOT as a DBE. MRBA members are free to take advantage of this opportunity.

49 CFR § 23.45(g) addresses two kinds of DBE goals: (a) overall goals for the entire DBE program, and (b) contract goals on each specific contract with subcontracting possibilities. Only the former goal is challenged in the instant case.

With regard to overall DBE goals, 49 CFR § 23.45(g)(1)[4] states:

> (1) Once the recipient has reviewed proposed contracting to identify those contracting activities which have the greatest potential for MBE [DBE] participation, the recipient shall set goals that are practical

---

[4]With enactment of STURAA, the program was expanded from a minority business enterprise (MBE) program to a disadvantaged business enterprise (DBE) program and the DBE designation superceded the MBE designation. Petitioner has stipulated that the regulations "incorporated the definition of social and economic disadvantage" and implement the expanded DBE program under STURAA. (Sixth Circuit Joint Appendix, Vol II, pp 335-336, ¶¶ 7, 8, 10, 11, 12 and 13.)

> and related to the potential availability of MBEs [DBEs] in desired areas of expertise.
> [Emphasis added.]

In setting overall DBE goals which are "practical and related to the potential availability of [DBEs] in desired areas of expertise," the recipient must apply certain mandated federal criteria:

> (5) The applicant shall consider the following factors in setting overall goals:
>
> > (i) Overall goals shall be based on projection of the number and types of contracts to be awarded by the applicant and a projection of the number and types of MBEs [DBEs] likely to be available to compete for contracts from the recipient over the period during which the goals will be in effect.
> >
> > (ii) Overall goals shall also be based on past results of the applicant's/recipient's efforts to contract with MBEs [DBEs] and the reasons for the high or low level of those results.
> 49 CFR § 23.45(g)(5)

The STURAA goal setting and submission process is mandatory under 49 CFR, § 23.41(a)(3)(i) which provides:

> (3) All applicants and recipients in the following categories who will let DOT-assisted contracts shall implement an MBE [DBE] program containing all the elements set forth in § 23.45. The program shall be submitted for approval to the DOT element concerned with application for assistance or project approval.
>
> (i) Applicants for Federal-aid highway program funds; [Emphasis added.]

As the underlined language indicates, recipients shall implement the program and do so in accordance with 49 CFR, § 23.45. 49 CFR § 23.45(k), adopted pursuant to STURAA, requires states under certain conditions to set aside contracts to be bid upon and awarded exclusively to DBEs ("set-aside contracts") as follows:

> Where not prohibited by state or local law and determined by the recipient to be necessary to meet MBE [DBE] goals, procedures to implement MBE [DBE] set asides shall be established.
> 49 CFR § 23.45(k).

With regard to submission of DBE percentage goals to FHWA above or below the 10% level, 49 CFR § 23.64(a)(d) and (e) state:

> (a) Each recipient of funds to which this subpart applies that is required to have an MBE [DBE] program under § 23.41 of this part shall establish an overall goal for the use of disadvantaged businesses.
>
> ***
>
> (d) Recipients submitting a goal of ten percent or more shall submit the goal under the procedures set forth in § 23.45(g) of this part.
>
> (e) If an FHWA or UMTA or FAA recipient requests approval of an overall goal of less than ten percent, the recipient shall take the following steps in addition to those set forth in § 23.45(g) of this part: [Emphasis added.]
>
> [Additional procedures are then set forth in the regulation.

> Since MDOT's goal is 15%, those procedures are not relevant.]

It is apparent that while the national goal is "not less than 10 percent," the goal for each recipient throughout the United States may be greater or less than 10 percent. The interpretation and practice of FHWA in this regard were specifically addressed by Respondent several years ago when the MRBA questioned MDOT's interpretation of the federal regulations. A clarification was sought from the FHWA. In response, USDOT's Deputy Assistant General Counsel Robert Ashby conveyed FHWA's position:

> In other words, the recipient must determine, based on the factors set forth in section 23.45(g) (i.e., number and availability of DBEs, the contracting opportunities for DBEs during the period covered by the goal, the historical participation of DBEs in the recipient's programs), what its overall goal should be. Doing so is a Federal regulatory

> requirement for recipients in the programs to which the DBE regulations apply (49 CFR 23.64(d)). If the goal submitted by the recipient is not sufficient under the standards of section 23.45(g), then it is subject to disapproval (49 CFR § 23.66), and the recipient could, ultimately, be found in noncompliance (49 CFR § 23.68). . . . Under the statute and regulations, the ten percent requirement is a minimum for nationwide DBE participation that this Department is expected to attain, not a ceiling on goals that the Department may expect a recipient to set.
>
> The statute and its legislative history do not vitiate the requirement of 49 CFR § 23.45(g) that recipients set appropriate goals based on their circumstances. If, based on the relevant factors, a recipient's goal should be higher than ten percent, then the recipient is obligated to set its goal at that higher level. The judgment about whether a state's proposed overall goal is acceptable is made by the concerned DOT operating administration (e.g., the Federal Highway Administration); this letter should not be construed as making any prejudgment about the specific goal that it is appropriate for the State of Michigan to establish.

Plaintiffs offered no evidence whatsoever to contradict that evidence of

FHWA's actual practice and its interpretation of the statute and regulations.

As referenced in Counsel Ashby's correspondence, 49 CFR § 23.66 provides for review and approval of all proposed DBE goals:

> (a) The Administrator reviews and approves any overall goal of ten percent or more submitted by a recipient as provided in § 23.45(g) of this part.
>
> (b) The Administrator of the concerned Departmental element approves a requested goal of less than ten percent if he or she determines, on the basis of the recipient's justification and any other information available to the Administrator, that ... . 49 CFR § 23.66(a) and (b). [Emphasis added.]

2. Michigan's compliance with the federal scheme.

In establishing a FY 1991 DBE goal, MDOT prepared a report entitled

"Development of the 1991 Fiscal Year Overall Goal for DBE participation." This report set forth the federally mandated criteria for developing an annual DBE goal and the methodology MDOT used to calculate its recommendation of a 15% DBE goal for FY 1991, including a projected minimal use of set-aside contracts, in the amount of 1.32%, necessary to meet the 15% DBE goal.

In response to MDOT's recommendation, the MRBA advised MDOT that it did not object to the methodology used by MDOT to reach the 15% DBE goal, but only objected to the level of the 15% DBE goal and the use of any set-aside contracts to achieve that goal unless MDOT first made independent findings that there had been past discrimination in Michigan.

Petitioner asserts in its Statement of the Case that 95% of the MRBA's members are excluded from bidding because of the member's race, ethnic origin and gender and implies that this exclusion extends to 15% of the total dollar amount of all federal highway funds awarded in Michigan for the year in question. (Pet. 4) That statement is misleading.

In fact, only 1.32% of project funds are set aside for bidding solely by DBEs. The MRBA's members do bid on the remaining 98.68% of projects. MDOT meets the remaining 13.68% of its goal by imposing various levels of DBE subcontracting requirements on those contracts which meet specified criteria.

The Michigan State Transportation Commission ("Commission"), which serves

as the policy-making head of MDOT, adopted the FY 1991 DBE goal of 15% and the minimal use of set-aside contracts in the amount of 1.32% at its meeting of August 22, 1990.

At the same August 22, 1990 meeting, the Commission formalized MDOT's past practice of affording contractors bidding on a federally funded project a means by which to seek a modification or waiver of DBE subcontracting requirements for specific contracts. This waiver procedure was implemented in accordance with 49 CFR § 23.45(h)(2) and the basic guidance provided at 49 CFR 23, Appendix A. Written guidance on this issue has been provided to contractors, and a revised Contract Special Provision and standardized form for Requests for Waiver have been developed.

The FHWA approved the recommended FY 1991 DBE goal on October 1, 1990, and the waiver form on October 2, 1990.

3. The trial and stipulation of the parties.

A bench trial was held on November 7 and 8, 1990. The facts and other matters expressly accepted by the parties and set forth in the Order On Pretrial Conference entered by the District Court on October 29, 1990 included, among other things, the following:

> II. Uncontroverted Facts: The parties have agreed that the following may be acceptable as established facts for purposes of this case only:
>
> ***
>
> 11. The state must comply with federal rules regarding contracting generally, and with federal rules respecting the disadvantaged business program in particular, as a condition of receiving federal funding of

construction projects. 23 U.S.C. Secs. 101 et seq. and 49 C.F.R. Sec. 23.68.

12. The federal regulations require a recipient of federal funds under STURAA, such as MDOT, to establish an annual goal for the use of Disadvantaged Business Enterprises (DBEs) and submit the goal to the United State[s] Department of Transportation (DOT) for approval. 49 CFR § 23.64. The regulations permit deviation from the statutory 10% target figure, either upward, 49 CFR § 23.64(d), or downward, 49 CFR §§ 23.64(e), 23.65. In setting its annual goal, MDOT is required to consider criteria such as the number and types of contracts to be awarded, the number of DBEs available to compete for these contracts, and the results of past efforts to contract with DBEs. 49 CFR §§ 23.64(d), 23.45(g)(5).

***

22. After having the opportunity to review the 'Development of the 1991 Fiscal Year Overall Goal for DBE Participation', the Plaintiff, Michigan Road Builders Association, Inc. on August 16, 1990, stated, among other things, that it had 'no objection to the procedure being used to develop the 1991 DBE Goal which considers prior

achievements, DBE contractor availability and the projected construction program.'

***

24. On August 22, 1990, the Commission adopted a 15% DBE Goal for the fiscal year beginning October 1, 1990.

25. On August 23, 1990, MDOT sent its 15% DBE goal to FHWA for review and approval.

***

29. On October 1, 1990, the FHWA approved MDOT's DBE Goal of 15% for Fiscal Year 1991, effective October 1, 1990.

***

33. The Surface Transportation and Uniform Relocation Assistance Act of 1987 (STURAA), Pub. L. 100-17, and the regulations adopted pursuant to STURAA found at 49 CFR 23.1 et seq. are constitutional for purposes of this action only. [Emphasis added.]

As seen above, Petitioner stipulated at trial and reiterated in both its trial and post-trial briefs that, for

purposes of this lawsuit, STURAA and its implementing federal regulations were constitutional. Petitioner made a deliberate decision to forego challenging the constitutionality of STURAA and its implementing regulations. In reliance on that stipulation, neither the USDOT nor the FHWA were made parties nor given the opportunity to otherwise participate in this case.

Petitioner, in its Statement of the Case (Pet. 4-5), suggests that Commission policy, rather than federal requirements, served as the basis for the Commission's adoption of a recommendation to use 1.32% set-aside contracts to achieve its 15% overall DBE goal. However, as MDOT testified at trial, while there were secondary reasons sup-

porting the use of set-aside contracts, set-aside contracts would not have been used if not necessary to achieve the overall DBE goal. Petitioner's Statement of the Case omits any reference to this unrefuted testimony by MDOT.

4. The District Court Decision.

On April 11, 1991, the District Court issued its Opinion and Judgment. MDOT and the Commission were dismissed as Defendants under the Eleventh Amendment. (Pet. App. 10a-11a) Former Governor James J. Blanchard was dismissed for Petitioner's failure to state a claim. (Pet. App. 11a) Finally all of Petitioner's claims were denied. (Pet. App. 22a)

The District Court found that the Petitioner had failed to establish

standing since Petitioner's testimony at trial did not meet Petitioner's burden of establishing standing by showing real, concrete injury. (Pet. App. 17a) There was no testimony that any individual Petitioner had either sought to be certified as a DBE, or had applied for and was available to complete any of the advertised projects. The District Court found the alleged injury to the sole Petitioner who testified only conjectural and hypothetical. (Pet. App. 12a-14a)

With respect to the MRBA itself, the District Court found MRBA had no standing since: (1) its individual members had not demonstrated standing on their own right; and (2) the Third Amended Complaint was not germane to MRBA's own

Constitution and By-Laws which provided that the MRBA "conduct only those activities which are for the common good and benefit alike for all members." (Pet. App. 14a, 16a) That is, some of MRBA's members were found to be DBEs as to whom the lawsuit would be detrimental rather than beneficial. (Pet. App. 16a)

Notwithstanding that decision, the District Court went on to rule on the merits of Petitioner's claims.

The District Court noted the irrelevance of Michigan Road Builders Association, Inc v Milliken, 834 F2d 583 (6th Cir, 1987), aff'd, 489 US 1061 (1989), which had struck down a state law based affirmative action program. (Pet. App. 17a) That program controlled the expenditure of state, not federal,

funds and there has been no claim that Respondent has, in any way, resurrected the program.

The District Court determined that MDOT had conscientiously followed the applicable federal statute and regulations. (Pet. App. 19a, 22a) The District Court recognized that neither STURAA and the federal regulations nor Fullilove v Klutznick, 448 US 448 (1980), and City of Richmond v J.A. Croson Co, 488 US 469 (1989), required MDOT as a recipient of federal funds, to conduct any inquiry to determine the existence of prior discrimination in Michigan. (Pet. App. 19a) The action of Respondent in establishing a FY 1991 DBE goal of 15% of which only 1.32% was reserved for set-aside contracts was

found to be a proper and constitutional implementation of federal law, consistent with the Fullilove and Croson decisions. (Pet. App. 17a-22a)

5. The Sixth Circuit Decision.

The Petitioner filed a claim of appeal on May 9, 1991 challenging the District Court's opinion on the issues of standing and the constitutionality of MDOT's actions. The Sixth Circuit Court of Appeals questioned the Distict Court's conclusions on lack of standing, then adopted, as its own, the District Court's reasoning on the merits of Petitioner's claims. (Pet. App. 1a) The Sixth Circuit specifically noted that, under the facts of this case, resolution of the appeal is governed by the Supreme Court's decision in

Fullilove rather than in Croson. (Pet. App. 1a)

SUMMARY OF REASONS FOR DENYING THE WRIT

Since Petitioner expressly stipulated to the constitutionality of STURAA and its implementing regulations, this case does not raise constitutional issues. Moreover, the case presents no close questions of interpretation; Petitioner has identified no basis for its position in STURAA or the regulations.

Respondent relies upon FHWA approval of its program and the plain and unambiguous language of STURAA and its implementing regulations to support both its 15% DBE goal and the 1.32% set-aside technique to aid in achieving that goal.

Respondent asserts that STURAA and its implementing regulations provide the

sole authority for its DBE program. By its enactment of STURAA, Congress determined that there had been past discrimination sufficient to justify remedial action and fashioned the remedy to address that past discrimination. While the point is not put in issue by this case, both Croson and Fullilove recognize the congressional power under Section 5 of the Fourteenth Amendment is to remedy such society-wide discrimination.

Recipients, such as Respondent, were not required to make individual findings of past discrimination nor were they required to individually establish the criteria to narrowly tailor the remedy. Indeed, recipients could not voluntarily undertake such an effort. Respondent

was not authorized to make separate findings with respect to past discrimination in Michigan and, based upon such separate findings, to either refuse to participate or modify the terms of its participation in the federally mandated program. Congress, not the recipients, fashioned the criteria by the program. Respondent's DBE program was intended to carry out the federal mandate in a manner which conformed to the remedial criteria fashioned in federal regulations. Respondent makes no claim to any independent basis in Michigan law for its DBE program.

Respondent specifically sought guidance from FHWA regarding the MRBA claim that MDOT's DBE goal was not to exceed 10 percent. FHWA advised Respondent to

apply the criteria set forth in the federal regulations and that, if application of the regulations to the factual circumstances in Michigan yielded a DBE goal in excess of 10%, Respondent was obligated to adopt such higher percentage goal. Both the trial and appellate courts below correctly found that Respondent did nothing more than conscientiously follow federal law.

Petitioner also seeks review of a standing issue. It is true that United States District Court Judge Douglas Hillman opined that Petitioner lacked standing; however, Judge Hillman conducted a trial on the merits and then ruled on the substantive merits of the Petitioner's claim. The United States Sixth Circuit Court of Appeals subse-

quently expressed disagreement with Judge Hillman's remarks on the standing issue, but went on to fully adopt his reasoning on the merits of the case. Since both courts decided the merits, Petitioner was obviously not denied consideration of the merits of its claims for lack of standing. The standing issue is moot. Resolution of the standing issue is, therefore, irrelevant to the ultimate outcome of the case.

This case has received more than adequate judicial scrutiny. No conflict of decision is presented by this case and no important question of federal law is raised. The petition should be denied.

REASONS FOR DENYING THE WRIT

THE SIXTH CIRCUIT'S DECISION UPHOLDING RESPONDENT'S FISCAL YEAR 1991 DBE GOAL OF 15% WITH THE LIMITED USE OF SET-ASIDE CONTRACTS IN THE AMOUNT OF 1.32% WAS ENTIRELY CONSISTENT WITH AND INDEED MANDATED BY STURAA AND ITS IMPLEMENTING REGULATIONS AND THE APPLICABLE DECISIONS OF THIS COURT.

1. THE CONSTITUTIONALITY OF STURAA AND ITS IMPLEMENTING REGULATIONS HAVING BEEN CONCEDED BELOW, THE FACTS OF THIS CASE DO NOT PRESENT THE CONSTITUTIONAL ISSUE ASSERTED BY PETITIONER.

Petitioner misstates the nature of the case when Petitioner asserts that the issue before this Court is whether Respondents' and the lower courts' construction of STURAA and the Federal Regulations can be considered a narrowly tailored means employed by Congress to achieve its objective, or whether STURAA and the Federal Regulations should be construed to mandate a preference goal

of just 10%. (Pet. 20) After conceding the constitutionality of STURAA and its implementing regulations below, Petitioner remains free to dispute the correctness of the court's construction of STURAA and the regulations, but may not dispute their constitutionality as so construed. However, virtually all of Petitioner's arguments represent an attempt to challenge their constitutionality under the guise of arguing the correct construction of STURAA and its regulations. (Pet. 21-22)

Petitioner knew when it filed this lawsuit that both Respondent and the FHWA interpreted the plain language of STURAA and the federal regulations to provide for DBE goals above 10 percent. Petitioner knew that FHWA had advised

Respondent that it was obligated to adopt a goal over 10% where application of the regulations yielded a goal in excess of 10 percent. Petitioner may not disclaim a constitutional challenge, exclude FHWA from participation in the suit, and then collaterally attack the entire federal DBE program. Having waived a constitutional challenge below, the petition attempting to resurrect it before this Court should be denied.

2. HAVING WAIVED OBJECTION TO MDOT'S METHODOLOGY USED IN ARRIVING AT ITS 15% OVERALL DBE GOAL, PETITIONER DOES NOT PRESENT AN IMPORTANT QUESTION ABOUT MDOT'S COMPLIANCE WITH STURAA AND ITS REGULATIONS WORTHY OF THIS COURT'S ATTENTION.

Petitioner attempts to circumvent its concession regarding STURAA's constitutionality when it argues that the 15%

overall DBE goal submitted by MDOT and approved by the FHWA fails to comply with STURAA and its regulations because these provisions "should be construed to mandate a preference goal of just 10%." (Pet. 20) This argument was thoroughly considered by the courts below and correctly rejected as lacking merit.

The uncontroverted testimony at trial revealed at least 12 other jurisdictions have approved DBE goals in excess of 10%. If the applicable regulation, 49 CFR § 23.45(g) (Pet. App. 47a-49a) did not require that states adopt a DBE goal in excess of 10% when calculated according to the three criteria established by the rules, there would be no reason for these twelve states to have a goal over 10%, nor for FHWA to have approved those goals.

MDOT's application of the regulations was approved by FHWA consistent with its actual past practice and interpretation of the statute and regulations it is charged with administering. STURAA's plain language requires an expenditure of "not less than 10 percent" of authorized funds with DBEs. STURAA, § 106(c). Petitioner stipulated that the regulations permit deviation from the statutory 10% figure either upward or downward pursuant to 49 CFR §§ 23.64(d) and (3) and 23.65. Petitioner has identified no aspect of Respondent's program which is contrary to those regulations.

The regulations require recipients to set goals based upon their local circumstances. Petitioner has not iden-

tified, and cannot identify, any language in STURAA and its implementing regulations to support Petitioner's construction that authority is only thereby given for DBE goals up to 10 percent. The lower courts correctly decided this case and Petitioner's efforts to escape its own admission below should fail.

3. PETITIONER'S COLLATERAL CHALLENGE TO FHWA'S APPROVAL OF DBE GOALS PRESENTS A HYPOTHETICAL QUESTION NOT WARRANTING REVIEW BY THIS COURT.

Petitioner contends that the decisions below interpret STURAA and its regulations to authorize a recipient to "adopt an unlimited goal" and to award all or up to 100% of its federal funds for highway projects to DBEs. (Pet. 6, 18, 19, 20)

Petitioner claims that any goal in excess of 10% is automatically approved by FHWA and is purely voluntary. No one, aside from Petitioner, has so much as suggested that a 100% DBE goal could be supported by any recipient or approved by FHWA. Nor have the lower courts rendered any decision such as described by Petitioner. The argument, overstating the rulings below and hypothesizing a state of facts unrelated to this case, lacks merit.

49 CFR § 23.66 provides for review and approval of all proposed DBE goals. (Pet. App. 56a) Given the regulatory criteria, it is inconceivable that every recipient in the United States could set 100% DBE goals and have them all approved by FHWA with the result that

"DBE's are entitled to all Federal-aid highway construction contracts." To so frame the dispute in this case is pure fantasy and ignores STURAA's purpose to facilitate the entry of DBEs into the contracting mainstream.

This case pertains to the goal set by a single recipient of federal highway funds. Respondent has never proposed a goal in excess of 15%.[5] Whether any higher goal might in a future case on different facts be submitted and be approved by FHWA is utter speculation. The evidence in this case pertains to what Respondent was required to do to arrive at a DBE goal in compliance with

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[5]Indeed, as goals are set annually, Respondent's current DBE goal has been reduced to 13.52%.

federal regulations. Petitioner chose not to name the FHWA as a party to this case and not to challenge its regulations and administration of the DBE program. No evidence was taken regarding the extent to which FHWA might approve recipient goals aggregating in excess of 10 percent. Petitioner's speculation as to how FHWA might administer the national DBE program and related collateral attack on those hypothetical actions does not present a question worthy of this Court's attention.

4. THE LOWER COURTS' DECISIONS UPHOLDING MDOT'S USE OF 1.32% SET-ASIDES AS AUTHORIZED BY THE FEDERAL SCHEME AND CONSISTENT WITH STATE LAW WERE CORRECTLY DECIDED.

49 CFR § 23.45(k), adopted pursuant to STURAA, authorizes the use of set-

aside contracts "[w]here not prohibited by state or local law and determined by the recipient to be necessary to meet MBE [DBE] goals." (Pet. App. 50a)

The language of 49 CFR § 23.45(k) discloses a federal intent to allow states to enact laws to prohibit use of set-asides, even if determined to be necessary to meet DBE goals. However, neither below nor in this Court has Petitioner identified any Michigan statute which would prohibit the use of set-asides. The Michigan legislature has not elected to opt out of using set-asides in this federal program.

The fact that the use of set-aside contracts will have other secondary beneficial effects, as noted in the Commission's policy and testimony of

Respondent, does not make their use unconstitutional. STURAA was adopted to allow DBEs the opportunity to enter into the mainstream of contracting and eventually gain sufficient experience to compete effectively with the established contracting community. The use of set-asides furthers that objective by allowing DBEs the opportunity to be prime contractors so that they can develop the skills, business structures and relationships, etc. necessary to act as a prime contractor and to engage in such competition.

Nevertheless, Respondent specifically testified at trial that even with their secondary beneficial effects, set-asides would not be used if not necessary to achieve MDOT'S overall DBE goal.

The testimony was uncontroverted, however, that use of set-asides was indeed necessary to meet MDOT's DBE goals.

5. THE LOWER COURTS CORRECTLY HELD THAT THE CONSTITUTION PERMITS A STATE TO IMPLEMENT A FEDERAL AFFIRMATIVE ACTION PROGRAM.

In Fullilove this Court held that Congress had the power to impose an affirmative action program such as at issue here as part of its power to enforce the equal protection guarantee of the Fourteenth Amendment. In his opinion, Chief Justice Burger stated that:

> Congress not only may induce voluntary action to assure compliance with existing federal statutory or constitutional anti-discrimination provisions, but also, where Congress has authority to declare certain conduct unlawful, it may, as here, authorize and induce state action to avoid such conduct. Id., pp 483-84.

Petitioner argues that Croson is applicable to the actions of the Respondent.[6] That case held that a DBE program established by a city was unconstitutional because the city had not made any findings that it had caused prior discrimination. Croson did not involve implementation of a federal program. It did not overrule Fullilove but instead specifically recognized its continuing

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[6]Indeed, Petitioner confuses the issues, failing to acknowledge the difference between the legal analysis this Court has held applicable to cases involving federal dollars expended by a state under a federal program adopted by Congress (such as here and in Fullilove) and those cases involving non-federal dollars expended under a program adopted by a political subdivision of a state (such as in Croson). See, e.g., Petitioner's citation to Milliken, supra, in which a state law program was struck down and no authority of Congress to enforce the Fourteenth Amendment was involved. (Pet. 4, n. 1)

validity. The lower courts correctly ruled that Croson does not apply to the instant matter because MDOT is implementing a federal program.

In Metro Broadcasting v Federal Communications Commission, 497 US 547 (1990), which was decided subsequent to Croson, this Court again held that Congress had the authority to specifically approve and mandate minority programs similar to those implemented by MDOT.

The rulings of the lower courts upholding Respondent's DBE program are supported by other appellate decisions as well. For example, in Milwaukee County Pavers Association v Fiedler, 922 F2d 419 (7th Cir, 1991), the plaintiffs challenged the DBE program followed by

Wisconsin which was very similar to that followed by MDOT herein. The Court upheld the constitutionality of Wisconsin's program and distinguished Croson:

> It is true that the statute [STURAA] does not require the states to accept funds under it and, by doing so, to become subject to the set-aside provision and the implementing regulations. But it authorizes them to do so, and action pursuant to a valid authorization is valid. The joint lesson of Fullilove and Croson is that the federal government can, by virtue of the enforcement clause of the Fourteenth Amendment, engage in affirmative action with a freer hand than states and municipalities can do. And one way it can do that is by authorizing states to do things that they could not do without federal authorization. That was Fullilove; it is this case as well. 922 F2d at 423-424.

The Court went on to hold:

> They [Plaintiffs] are challenging the state's role in the program. Insofar as the state is merely doing what the statute [STURAA] and regulations envisage and permit, the

> attack on the state is an impermissible collateral attack on the statute and regulations.
> 922 F2d at 424.

The Sixth Circuit recently discussed the difference between Croson and Pullilove in Tennessee Asphalt Company v Farris, 942 F2d 969 (6th Cir, 1991). In that case, the Tennessee Road Builders Association and some of its members filed an action to challenge the constitutionality of Tennessee's DBE program. Like the instant matter, the plaintiffs in that case conceded that the Surface Transportation Assistance Act, Pub. L. No 97-424; 96 Stat 2097, 2100 (1983), the forerunner of STURAA, and the regulations found at 49 CFR § 23.1 et seq were constitutional, but alleged that they were improperly applied by Tennessee. 942 F2d at 972. The Court

held otherwise concluding that the case was ". . . controlled by Fullilove and not by Croson and Wygant." 942 F2d at 975. The Court noted that a state's compliance with the mandates of a federal scheme is nothing more than compliance with federal law. 942 F2d at 975.

The Second Circuit in Harrison & Burrowes v Cuomo, 981 F2d 50 (2nd Cir, 1992), reached a similar conclusion in finding that the State of New York properly followed STURAA and the federal regulations in adopting a DBE goal of 17%.

MDOT's DBE goal is a conscientious implementation of a lawfully enacted federal program and was correctly upheld by the courts below.

6. THE STANDING ISSUE IS NOT RELEVANT AND IS MOOT.

As stated in Sup. Ct. R. 10.1, "[a] review on writ of certiorari is not a matter of right, but of judicial discretion". Generally, certiorari will be granted only in the most compelling of circumstances, such as the need to secure uniformity of federal law or to address an issue of overriding public importance. Accord Sup. Ct. R. 10.1 (a)-(c). No such compelling circumstance exists with respect to the standing issue in this case.

It cannot be disputed that the Sixth Circuit did not affirm the District Court's decision on the standing issue. The Sixth Circuit questioned the conclusions of the District Court concerning

lack of standing (Pet. App. 1a), but obviously felt no need to elaborate since the merits of Petitioner's claims were addressed. The Sixth Circuit decision, therefore, provides no real or intolerable conflict among the circuits or even an adjudication of the standing issue warranting review by the Court. Addressing the District Court's analysis of the standing issue would be irrelevant to the ultimate outcome of the case, with both courts below having reached a decision on the merits. Resolution of any perceived conflict would not change that decision on the merits.

In Stern, Gressman & Shapiro, Supreme Court Practice, 6th Edition § 4.4, pp 200-201 (1986), the authors cite the policy of letting tolerable

conflicts go unaddressed, especially if the issue is no longer a live one or the resolution of the conflict is irrelevant to the ultimate outcome of the case before the Court. The standing issue in this case does not warrant review by this Court.

CONCLUSION AND RELIEF SOUGHT

For all of the foregoing reasons, Respondent respectfully urges this Court to deny the Petition for Writ of Certiorari.

Respectfully submitted,

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February 19, 1993